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No. 97-537

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. §158(d) provide the court of appeals with subject matter jurisdiction to review a non-final order of the district court sitting as a court of appeals in a bankruptcy case?

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BRIEF IN OPPOSITION

The respondent Gay C. Ricca-Stroud ("Mrs. Ricca-Stroud"), a creditor of the estate of the debtor Francisco Lopez ("Dr. Lopez"), respectfully submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (the "Petition").

OPINIONS BELOW

The court of appeals' decision is reported at 116 F.3d 1191 and is reprinted in the appendix to the Petition. (Pet. App. 1a). The district court's opinion is reported at 201 B.R. 943 and is reprinted in the appendix to the Petition. (Pet. App. 7a). The district court's order denying rehearing is unreported and is set forth in the petitioner's appendix. (Pet. App. 16a). The proceedings in the bankruptcy court are unreported. The bankruptcy court's order granting discharge and a transcript of the oral opinion of the bankruptcy court are set forth in the appendix to the Petition. (Pet. App. 19a, 20a).

STATUTORY PROVISIONS

In addition to 28 U.S.C. §158(d) and §1291 which are set forth in the petitioner's appendix (pet. app. 25a, 26a), 28 U.S.C. §1292 and 28 U.S.C §2072 are set forth in respondent's appendix. Resp. App. 1a, 4a.

STATEMENT OF THE CASE

In June of 1994 the respondent, Gay Ricca-Stroud, filed her four-count adversary complaint

against the petitioner, Dr. Francisco Lopez, seeking a denial of discharge under §727 of the Bankruptcy Code. 11 U.S.C. §727 (1994). Mrs. Ricca-Stroud alleged that Dr. Lopez fraudulently understated the market value of certain assets identified on his bankruptcy schedules, including certain condominiums located in Acapulco, Mexico, a medical complex located in Chicago Ridge, Illinois, and his 100% ownership interest in Cardiology and Internal Medicine Associates, S.C., a medical corporation employing Dr. Lopez and other physicians and carrying on other business related to the practice of medicine. Mrs. Ricca-Stroud also alleged the failure to schedule a certain real estate investment trust as a separate ground for the denial of discharge.

Dr. Lopez scheduled the value of the medical corporation as $500, and, due to its low value, claimed it as exempt from the creditors. At all times throughout the bankruptcy proceedings and thereafter, Dr. Lopez continued to operate the medical corporation[1] as he had done prior to filing.

The bankruptcy court struck the counts related to the Acapulco condominiums and the medical complex for failure to state fraud with sufficient particularity. After discovery and extensive briefing, the bankruptcy court denied Dr. Lopez's motion for summary judgment as to the entire adversary com-

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[1] Subsequent to its judgment on the adversary complaint, the bankruptcy court ordered the bankruptcy trustee to abandon the medical corporation to Dr. Lopez, despite Mrs. Ricca-Stroud's bid of $25,000 for the interest in the corporation. This abandonment is the subject of a second appeal currently pending in the District Court for the Northern District of Illinois, No. 96 CV 4969.

plaint. The bankruptcy court denied Mrs. Ricca-Stroud leave to amend her complaint to restate one of the stricken counts and to include a new count. The case went to trial on the remaining counts. The bankruptcy court rendered judgment for Dr. Lopez in October of 1995 and Mrs. Ricca-Stroud appealed.

The appeal to the district court was not a single issue appeal as the Petition might lead the Court to infer. The following issues were presented as error: (1) the denial of Mrs. Ricca-Stroud's motion to amend her complaint; (2) the bankruptcy court's finding that the $500 valuation of the medical corporation was not a false oath; (3) the bankruptcy court's ruling that Dr. Lopez was not accountable for the truthfulness of his oath because he relied on his attorney to prepare his petition; (4) the bankruptcy court's ruling that Dr. Lopez did not make a false oath where he relied on third parties to value his assets, even though he did not believe some of the valuations; (5) the bankruptcy court's finding that the evidence did not demonstrate reckless intent tantamount to fraud in violation of §727 of the Bankruptcy Code; and, (6) the bankruptcy court's extra-judicial factual investigation made during the course of trial. Pet. App. 7a-8a.

The district court affirmed the denial of the motion to amend the complaint, unable to find an abuse of discretion. The court found that Mrs. Ricca-Stroud's contentions regarding the principal's liability for the acts of agents and attorneys were without merit. Without affirming or reversing, the district court remanded the case to the bankruptcy court for further factual development regarding Dr. Lopez's fraudulent intent and the proper method of valua-

tion with reference to *In re Prince*, 85 F.3d 314 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 608 (1996).

The district court's ruling on the petitioner's motion for rehearing clearly establishes that the court did not dispositively reach the issue of intent. The district court wrote, "[o]n the basis of the current factual record, the Court was not and still is not able to determine whether or not Dr. Lopez acted with fraudulent intent when he signed his bankruptcy schedules with respect to the valuation of his medical practice." Pet. App. 17a. The court specifically remanded the matter to the bankruptcy court to receive evidence related to the petitioner's intent. *Id.*

The district court expressly did not address all the evidentiary issues tending to demonstrate the petitioner's culpable intent. The district court noted that these issues were closely related to the remand previously ordered, and thus the bankruptcy court must examine them in light of the record upon remand.[2] Pet. App. 14a., n. 3. For similar reasons, the district court did not address the bankruptcy court's use of extra-judicial evidence in ruling.[3] *Id.*

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[2] The court stated, "[a]lthough Ms. Ricca-Stroud has argued that several other statements made by Dr. Lopez were false and thereby establish this pattern of recklessness, those statements all have to do with the valuation of the medical corporation. That issue has been addressed earlier in this opinion. Whether any of those statements were false and were made knowingly will have to be determined based upon the additional facts to be developed by the bankruptcy court upon remand." Pet. App. 14a., n. 3.

[3] The court stated, "[b]ecause I have remanded the case for further factual development on the issue of the valuation of

The petitioner incorrectly states that the bankruptcy court found as fact that Dr. Lopez would not continue to work for the medical corporation. (Pet. 3-4). This finding does not appear in the bankruptcy court's judgment. The Petition additionally misstates that Mrs. Ricca-Stroud did not raise her inability to adequately cross examine Dr. Lopez's experts at trial. (Pet. 5, 6). In her pleadings before the district court, Mrs. Ricca-Stroud explicitly claimed as error that the bankruptcy court refused to fully permit her cross-examination of the petitioner's attorney who claimed responsibility for the valuations on the schedules.[4]

On appeal to the Seventh Circuit Court of Appeals the court dismissed the petitioner's appeal for want of appellate jurisdiction. The court applied the

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the medical corporation, I need not reach the propriety of the judge's references to this document. Nevertheless, I would caution the bankruptcy judge not to refer to documents that are not in evidence in the case." Pet. App. 14a., n. 3.

[4] Throughout the trial, the petitioner was portrayed as so unsophisticated that he could not know whether his company was worth $500 or over $1 million. The responsibility for the truth of the bankruptcy petition was therefore delegated to his attorney. In addition to representing the petitioner in the bankruptcy court, the petitioner's attorney testified as an expert witness on behalf of the petitioner. However, during the course of cross-examination, the bankruptcy court limited the respondent's examination, interjecting, "Mr. Schindler is not on trial, sir. This is the debtor who is on trial. The debtor states at the bottom of his schedules that he declares these statements to be true under penalty of perjury. And I think you are not attacking this problem with Mr. Schindler in a way that the Court could hold the debtor responsible for these statements." (Tr. 213-214).

majority rule as identified in the Petition. Chief Judge Posner stated:

> This is not such a case [where the proceeding on remand is not likely to generate further appeals]. The issue is whether the debtor fraudulently undervalued his assets and so should be denied a discharge of his debts. The purpose of the remand ordered by the district court is to determine the value of the debtor's principal asset under principles set forth in a recent decision by this court, *In re Prince*, 85 F.3d 314 (7th Cir. 1996), because whether the debtor did undervalue his assets, and if so by how much, is important to the issue of fraudulent undervaluation, though not necessarily conclusive. It is apparent that such a remand is not ministerial, and therefore we have no appellate jurisdiction if we adhere to *Riggsby* and the cases following it.

Pet. App. 2a. The court of appeals rejected the minority approach finding that the term "final" in §158(d) is not "a term of art meaning 'final or non final'" but "requires meaningful finality, albeit finality of the proceeding embedded in the overall bankruptcy case rather than of the bankruptcy case itself." Pet. App. 5a. The court additionally examined the "compelling practical objections" to the minority view. *Id.* Accordingly, the court dismissed the appeal.

REASONS FOR DENYING THE WRIT

I. The Court need not decide the appeal since §1292 already operates to confer jurisdiction in cases where a disputed issue of law exists and an interlocutory appeal would materially advance the ultimate disposition of the litigation.

The Court need not address the merits of the majority approach or the minority approach to appellate jurisdiction in bankruptcy cases, since the goals to be achieved by either approach are presently attainable under the statutory scheme embodied in 28 U.S.C. §158(d) and 28 U.S.C. §1292(b). Thus there is no merit in the Petitioner's claim that the Court must resolve the split among the circuits identified in the opinion below. Pet. App. 1a, *et seq.*

This Court has found that like §1291, §158(d) does not confer appellate jurisdiction over interlocutory orders of the district court sitting as a court of appeals in bankruptcy. *Connecticut National Bank v. Germain*, 503 U.S. 249, 252 (1992) (parties must agree that §158 does not confer jurisdiction on the court of appeals over interlocutory orders). However, §1292 is operative in bankruptcy cases in the same manner as in ordinary civil litigation. *Id.* at 254. While *Germain* may not be wholly dispositive of the issue presented in the Petition, it is instructive on the interaction among the several statutes addressing appellate jurisdiction.

Germain has been acknowledged by the minority courts as casting doubt on the continued validity of the various minority approaches to appellate juris-

diction in bankruptcy matters. *See e.g., Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.)*, 81 F.3d 103, 105 (9th Cir. 1996). The majority-view appellate courts have found *Germain* to fortify the traditional application of finality principles to bankruptcy appeals. *Quiros Lopez v. Unanue Casal (In re Unanue Casal)*, 998 F.2d 28 (1st Cir. 1993).

In *Unanue Casal* the First Circuit held that "jurisdiction to review a district court appellate order in a bankruptcy case derives from either of two statutory sources: (1) the bankruptcy appeal provisions of...§158(d); or (2) the interlocutory appeal provisions in...§1292 applicable to civil actions generally." *Id.* at 31 (*citing Germain*). The case clearly applied the majority rule concerning appellate review of final bankruptcy orders.[5] The court found that §158(d) demands a final order, although the accepted exceptions to finality, such as the collateral order doctrine, could apply.[6] *Id.* The court

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[5] The court firmly held that "[a]ccordingly, a district court order in an adversary proceeding is not appealable as of right under section 158 (d) unless it ends the entire proceeding 'on the merits and leaves nothing for the court to do but enter the judgment.' *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 37, 375 (1987) (*quoting Caitlin v. United States*, 324 U.S. 229, 233 (1945))." *Id.*

[6] *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 726-7 (11th Cir. 1995), identifies three exceptions to the finality rule: (1) the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949); (2) the doctrine of practical finality of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848); and (3) the "most extreme" exception for review in marginally final cases bearing on fundamental issues pertinent to the further conduct of the

additionally found that although an interlocutory appeal pursuant to §1292(b) would otherwise be an option in the case, the court could not entertain such an interlocutory appeal since the appellant failed to obtain the necessary certification and comply with the 10-day jurisdictional time period. *Id.* at 32, 33.

The purpose of §1292(b) is stated clearly in its text: in matters where there is a "controlling question of law as to which there is substantial ground for difference of opinion and...an immediate appeal from the order may materially advance the ultimate termination of the litigation," jurisdiction will vest in the appellate court. 28 U.S.C. §1292(b).

The petitioner argues for jurisdiction asserting that the district court erred on a matter of law so dispositive that a decision by the appellate court "would quickly and efficiently wrap up a bankruptcy proceeding." Pet. 8. This argument is based on the presumption that he is correct on the underlying merits of the substantive case. According to his argument, jurisdiction would lie under §158(d) if the court of appeals would rule in his favor; yet there would be no jurisdiction if that court would find in favor of the respondent because the case would not, after all, be totally resolved. The parties therefore would be required to expend all of the time, cost, and effort of presenting a case on the merits to the court of appeals, and the court would have to decide

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case, identified in *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964).

the merits of the case *before* determining jurisdiction. This is a backwards approach to jurisdiction.[7]

Even if it were true that the resolution of a single legal issue would definitively advance the resolution of the case *sub judice*, it not necessary for this Court to resolve the divergent approaches to the question of finality under §158(d), since §1292(b) clearly supplies the route for the appeal desired by the petitioner. If the petitioner's characterization of the case were accurate, then the district court would have likely provided the certification identified in §1292(b). However, the petitioner did not seek certification. He should not be heard to make a strained argument before the court of appeals that an interlocutory order is in reality a final order. In effect, the petitioner seeks §1292(b) review while sidestepping the certification requirement of that section.

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[7] It must be remembered that the district court did not reach all issues raised by Mrs. Ricca-Stroud in her appeal. Upon remand these issues were either to be considered in further detail by the bankruptcy court or possibly become unnecessary to decide (depending upon the resolution of the remand). Thus, the petitioner's supposition, that the determination of a single legal issue would put the case to rest, cannot be taken as correct, since there were other, alternate grounds warranting reversal that were not reached by the district court in the first instance. Similarly, Mrs. Ricca-Stroud should at some point become entitled to take her own appeal to the court of appeals from the adverse rulings of the district court, such as the denial of her motion to amend the adversary complaint. Again, the petitioner's promise that a decision of the court of appeals would have "obviated the need for a remand, resolved all issues regarding Dr. Lopez's assets, and closed the bankruptcy proceedings entirely" is not accurate. Pet. 14.

The district court is the appropriate place to address the merits of the §1292(b) certification. The district court has already extended its efforts in reviewing the common law record, the trial transcripts, the arguments of the parties, the legal precedent governing the dispute, and the judgment of the court below. The court of appeals is exactly the wrong place to address these questions, since to do so basically requires a complete hearing on the merits merely to determine the question of jurisdiction. Section 1292(b) clearly intends to avoid unnecessary waste of judicial resources by demanding that the certification be acquired at the district court level. The petitioner's proposed rule of law runs contrary to the policy to be achieved by §1292(b) since it needlessly consumes scarce judicial resources.

Section 1292(b) jurisdiction is by its terms discretionary in the appellate court. This discretion in reality will permit the courts of appeals from both the majority and minority view courts to exercise jurisdiction according to law and still pursue the needs and policies of their particular circuits. It may be that the majority view courts would decline review of the matter based on their stated policy, while the minority circuits would elect to hear the appeal, intending to achieve their stated goals. Section 1292(b) thus invests the minority view courts with the ability to achieve their stated policies without the need to graft a strained and unwarranted meaning on the plain language of §158(d).

II. The Court need not decide the appeal since §1292(e) supplies rulemaking authority to provide for appellate jurisdiction over interlocutory remand orders like that entered in this case.

The Federal Courts Administration Act of 1992 added subsection (e) to 28 U.S.C. §1292. Pub. L. No. 102-572, 101. Subsection (e) expressly authorizes the Supreme Court to add to the types of interlocutory orders which may be appealed to the Courts of Appeal, which are not otherwise identified in the first four subsections of the law. Additional rulemaking authority can be found in 28 U.S.C. §2072, providing the Court with the ability to define what constitutes a final judgment for the purposes of §1291. To the respondent's knowledge, the Court has not yet exercised its authority pursuant to §1292(e), however, it is respectfully submitted that the Court could readily resolve the disputes among the circuits by exercising its rulemaking authority, thus obviating the need to entertain this appeal.

CONCLUSION

The respondent respectfully prays that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted:

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United States Code
Title 28. Judiciary and Judicial Procedure
Part IV–Jurisdiction and Venue
Chapter 83–Courts of Appeals

1292. Interlocutory decisions.

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as

to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction–

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a

statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

* * * * *

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

United States Code
Title 28. Judiciary and Judicial Procedure
Part V--Procedure
Chapter 131--Rules of Courts

2072. Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.